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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1293

CLYDE R. GOAD, DONALD D. LANE, DANIEL R. MAHANY
and MICHAEL RYAN,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

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To the United States Court of Appeals
For the Eighth Circuit

The petitioners, Clyde A. Goad, Donald D. Lane, Daniel R. Mahany and Michael Ryan, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on January 14, 1974.

OPINIONS BELOW

No formal opinion was rendered by the District Court.

The opinion of the Court of Appeals has not yet been reported, and is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the court below (Appendix B 1, infra p. A-16) was entered on January 14, 1974. A timely petition for rehearing or rehearing en banc was denied on February 5, 1974 (Appendix B 2, infra p. A-17). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioners, officers of a labor union, were indicted and convicted of violating Title 29, Section 501 (c) United States Code, by allegedly stealing, embezzling and willfully abstracting and converting the monies of the union. The prosecution proved only that the expenditures in question, in the form of petitioners' salary increases, were made in violation of authorization procedures set forth in the union's by-laws, and nothing more. Defense offers of proof as to good faith and justification regarding the salary increases were totally rejected. The questions presented are:

1. Is Section 501 (c) (embezzlement by labor union officials) a specific intent crime, or does it do away with the traditional requirement of fraudulent intent and impose strict criminal liability on any union officer who expends union funds without complying with the authorization procedures in the union's by-laws?

2. Are union officers charged with embezzlement from their union, who purportedly did not follow by-law procedures in making expenditures, nevertheless entitled to negate any criminal or fraudulent intent by showing that the expenditures were made in good faith and with reasonable justification?

3. Are labor union officials guilty of embezzlement who spend union funds contrary to by-law authorization procedures, even

if the expenditures are in furtherance of a legitimate union purpose and for its benefit?

4. Are labor union officials subject to a higher and more exacting standard of conduct than other fiduciaries, so that they are guilty of embezzlement even absent an intent to defraud?

5. Can a federal court, by insisting on its own interpretation of a union constitution, make union expenditures criminally unlawful because they are made without following the by-law procedure, even though they are ratified and approved by the general membership at its regular monthly meetings?

STATUTORY PROVISIONS INVOLVED

This case involves § 501(c) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 535, 29 U.S.C. § 501(c), which provides:

> "Embezzlement of assets; penalty.
>
> (c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

STATEMENT OF FACTS

Petitioners were indicted and convicted of violations of 29 U.S.C. § 501(c). During the period covered by the indictment, petitioners were the four elected officers of Local Union 600, International Brotherhood of Teamsters, Chauffeurs, Warehouse-

men and Helpers of America. Each petitioner-officer was charged with receiving a $50.00 per week salary increase on three different occasions, which salary increases were not authorized by the Executive Board of the local union. Petitioner Lane, as president of the union, was not only charged in the three counts relating to his own salary increases, but was also charged as an abettor in the nine other counts dealing with the raises to the other officers.

The government proved only that the four defendants did in fact receive and accept the three salary increases (R. 51-52, 85-86), and that such increases had not been authorized by any formal action of the Executive Board (Ex. 3, R. 68-69), nor were the members specifically informed. It also introduced into evidence the union's Constitution and By-Laws, which grants to the Executive Board (consisting of the four defendant officers and three trustees) the power to approve the salaries for officers, agents and employees of the union. None of the foregoing evidence was in controversy.

Also uncontroverted was the government's own evidence that each month, at the regular meeting of the general membership of the union, a resolution was passed authorizing the President and Secretary of the union to make whatever expenditures of union funds "they believe is related to the interest and benefit of Teamsters Local 600 **without any prior approval"** (Emphasis added) (R. 77).

The government made no attempt to prove that the salaries were unearned or unjustified, or that they did not represent compensation for additional services or responsibilities on behalf of the officers.

Defendants offered to prove: that their hours of work had vastly increased, and included substantial night and Sunday work, thereby justifying the increases (R. 269-271; 318); that

the percentage of increases they received were about the same as the union members received in their various jobs in industry (R. 287, 499); that the salary increases merely brought defendants up to the pay levels comparable with officers of similar local unions in the community (R. 286, 373-374); and that the salary increases were fairly earned, on an equitable or *quantum meruit* basis, or at least the defendants believed them to be so earned (A. 279-281). All of this offered evidence was rejected by the trial court, upon government objections.

All defendants were convicted on all counts (R. 508-511). In affirming the convictions, the Eighth Circuit upheld the trial court's exclusion of all evidence of justification and *quantum meruit* regarding the raises, stating that where expenditures are made by union officers acting contrary to by-law procedures, all evidence of good faith or intent is irrelevant (Appendix A. p. A-15). In addition, the Eighth Circuit, in finding that a prima facie case had been made, chose to follow the minority opinion in **United States v. Silverman,** 430 F. 2d 106, 117 (2nd Circ), in which Judge Moore held that a 501(c) violation is established by **either** a lack of authorization **or** a lack of union benefit from the expenditure, and rejected the majority opinion of Judge Friendy (concurred in by Judge Hayes) suggesting that both a lack of authorization and a lack of union benefit are necessary to make out the crime (Appendix A, pp. A-13-14).

A timely petition for rehearing or rehearing en banc was denied (Appendix B 2, p. A-17), and this petition was filed in due course.

REASONS FOR GRANTING THE WRIT

1. The decision below, in dispensing with fraudulent intent as a necessary embezzlement element in certain situations, breaks new ground in the field of federal embezzlement crimes. In this regard, it subjects labor union leaders to a different and more stringent scope of criminal liability than all other fiduciaries whose conduct is congressionally regulated. The Eighth Circuit opinion on this issue is somewhat of an enigma, although the end result is clear and unambiguous. In one paragraph, the opinion apparently upholds the necessity of fraudulent intent as an element of the crime (Appendix A, pp. A-13-14), yet in the very next paragragh, and particularly footnote 10 thereto (Appendix A, p. A-14), the opinion very clearly announces that "good faith" and intent are properly excluded from consideration whenever a union official does not follow the union's proper authorization procedures in making expenditures.

In effect, then, the Eighth Circuit holds that in most instances fraudulent intent is still a necessary element of embezzlement. But where the embezzlement charge involves a union official who has not adhered to union by-law procedures, the intent element disappears and the officer is subject to strict criminal liability for his actions, as long as they were not accidental or by mistake. This, of course, conflicts directly with this Court's analysis and holding in **Morissette v. United States,** 342 U.S. 246, in which all of the federal embezzlement and stealing statutes were characterized as defining crimes of "intendment," pointing out that Congress, in enacting these various statutes, never intended to eliminate the common law requirement of criminal intent as an essential ingredient of the crime.

The great public importance of this issue is evident. Are labor union officers a more dangerous and separate class to be treated differently than all other fiduciaries (i.e., bank offi-

cers, government employees, and other classes who are subject to the various federal embezzlement statutes), and to be held subject to strict criminal liability, regardless of their intent, for unauthorized expenditures? The answer to this question is vital to all who seek or accept office in any labor organization, on local and higher levels, and may well determine whether or not many of those persons continue their careers as professional union leaders.

2. In upholding the rejection of all of defendants' evidence offered to negate intent, the opinion below directly conflicts with every decision, from virtually every circuit, concerning crimes involving criminal or fraudulent intent. The evidence offered by defendants (that their salary increases were earned and justified) was, obviously, of primary significance to each defendant's state of mind when he accepted each salary increase in question.

The cases are legion that one charged with a specific intent crime must be afforded wide latitude in proving good faith or lack of criminal intent. Examples are the Tenth Circuit decisions in **Haigler v. United States,** 172 F. 2d 986, and **United States v. Brown,** 411 F. 2d 1134; the Sixth Circuit decision in **Krogmann v. United States,** 225 F. 2d 220; the Second Circuit opinion by Judge Learned Hand in **United States v. Matot,** 146 F. 2d 197, subsequently reaffirmed in **United States v. Platt,** 435 F. 2d 789; and the recent Fifth Circuit decision in **United States v. Musgrave,** 444 F. 2d 755. Each of these decisions emphasizes that evidence which is otherwise incompetent (such as evidence of other transactions, or hearsay statements made to a defendant) are nevertheless admissible if it bears on the accused's state of mind. The Eighth Circuit has rejected this unbroken line of precedent, at least in regard to labor union officers, who somehow are not found to be entitled to the same protections of the law as others. Ignored by the opinion below was the wise counsel of Judge Hand in **United**

States v. Matot, supra, pointing out that a defendant who denies possessing the requisite criminal intent should not be confined to his bare denial but should be entitled to corroborate that denial by anything which confirmed it.

Also ignored by the Eighth Circuit were the words of Judge Moore in his minority opinion in **United States v. Silverman,** supra, the very opinion embraced by the court below negating the necessity of proving lack of union benefit. Judge Moore, while holding that lack of union benefit is not a prerequisite to a 501(c) violation, nevertheless did declare that proof of "a bona fide union benefit would be strong evidence that there was not intent", 430 F. 2d at p. 115. But here, of course, both the trial court and the Eighth Circuit deprived defendants of the opportunity to make that proof.

In short, the opinion below can in no way be reconciled with the well established precedents in every other circuit. If not reviewed and corrected by this Court, it would stand as a dangerous, confusing and unexplained exception to the rule which guarantees a criminal defendant the right to refute the allegations of a fraudulent intent.

3. The opinion below conflicts with the majority opinion in **United States v. Silverman,** 430 F. 2d 106, and now creates great uncertainty as to the areas of applicability of Section 501(c). In **Silverman,** the minority opinion of Judge Moore holds that a 501(c) violation is established whenever a union official makes an expenditure (with fraudulent intent) which is **either** without proper union authorization, **or** is of no benefit to the union. The majority opinion by Judge Friendly, concurred in by Judge Hayes, rejects this conclusion, and suggests that lack of union benefit from an expenditure is an essential ingredient to any 501(c) prosecution. The basis of the majority, of course, was that in enacting 501(c), "Congress subjected union officers or employees to the same test of criminal liability as government employees, bank officers, and the like

—not to a lower one", 430 F. 2d at p. 127. Hence, expenditures made for the union's benefit, even without proper authorization, could not be construed to be embezzled funds.

To add to the confusion, the Sixth Circuit has recently reviewed the requisites of a 501 (c) violation in **United States v. Vitale,** — F. 2d — (No. 73-1559, decided January 15, 1974), quoting with approval the minority view of Judge Moore in **Silverman,** yet strongly implying in its holding that the **benefit** is the crucial test in any 501(c) charge. If nothing else, this decision demonstrates the importance and uncertainty of the contrasting opinions in **Silverman** and the burgeoning scope of the problem.

The conflict, between Judge Moore's minority opinion and the Eighth Circuit here on the one hand, and the Friendly-Hayes majority in **Silverman** on the other hand, is square. Is the lack of benefit to the union an essential ingredient of a 501(c) crime? It is a conflict which raises grave practical as well as legal problems. A union president, for example, whose union suddenly strikes an employer and needs picket signs by 8:00 A. M. the next day, must think twice before he signs a check for $200.00 on his own in an emergency to buy those signs, contrary to his union by-laws requiring approval of his executive board. If his office is in New York and within the Second Circuit, he is probably safe in making the expenditure because it is clearly for the union's benefit and the Friendly-Hayes opinion will exonerate him; but if his union is in St. Louis or anywhere in the Eighth Circuit (or even in Detroit in the Sixth Circuit), he will be committing the crime of embezzlement under 501(c) if he buys those signs without formal approval of the executive board.

Labor union leaders, of course, should not be disdained by the law as second class citizens. They are entitled to clear and specific guidance from the statutes and the courts as to their

duties and liability; they should not be left guessing as to whether certain of their acts may constitute crimes. For this reason, the opinion of the Eighth Circuit below, which has created confusion and uncertainty among responsible labor lawyers and union officials throughout the land, should be reviewed, and all union officials thereafter be given an unequivocal definition, by the nation's highest court, of their areas of criminal responsibility under 501(c).

4. The decision below plainly contravenes decisions in the Sixth, Third and the District of Columbia Circuits, establishing the general principle that union officials, and not the courts, are the proper parties to interpret the union's constitution and by-laws. See, for example, **Vestal v. Hoffa,** 451 F. 2d 706 (6th Circ.), **cert. denied** 406 U. S. 934; **Sabolsky v. Budzanoski,** 457 F. 2d 1245 (3rd Cir.), cert. denied 409 U. S. 853; **English v. Cunningham,** 282 F. 2d 848 (D. C. Cir.).

In the instant case, the government's evidence established the uncontroverted fact that each month the general membership of union, at its regular meeting, passed a resolution authorizing the President and Secretary-Treasurer to make whatever expenditures of union funds they deem appropriate for the benefit of the union **"without any prior approval"** (R. 77). It was this resolution which defendants relied upon in granting salary increases without first obtaining executive board authorization.

The Eighth Circuit, however, substituting its own judgment and interpretation for that of the union's officers, now holds that "this general resolution cannot be read as rescinding the specific constitutional provision requiring Executive Board approval of salary increases. To do so would defeat the provisions of the union's constitution" (Appendix A, p. A-5). In order to reach this conclusion, the court below necessarily made the critical interpretation that the union constitution section (providing for executive board approval for expenditures) was the **exclusive** procedure whereby the union could make expenditures.

But such interpretation, which is nowhere supported by anything in the record, is directly contrary to the interpretation made by the union's officers for years and years (R. 77, 423), and is obviously directly contrary to the interpretation made by the present officer-defendants.

If permitted to stand, the decision below, whereby the appellate court substitutes its own interpretations for those made by the lawfully elected union officials, establishes a serious conflict with the precedent in other circuits, and casts a great shadow on the autonomous character of labor unions and their members' rights to govern themselves on matters of internal union affairs.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 73-1309

United States of America, Appellee, v. Clyde R. Goad, Donald D. Lane, Daniel R. Mahany and Michael Ryan, Appellants.	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: November 12, 1973

Filed: January 14, 1974

Before Gibson, Lay, and Heaney, Circuit Judges.

Gibson, Circuit Judge.

The four defendants were charged and convicted of violating 29 U.S.C. §501(c)[1] of the Labor-Management Reporting and

[1] 29 U.S.C. § 501(c) provides:

Embezzlement of assets; penalty

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Disclosure Act of 1959, 29 U.S.C. §401 *et seq.* (hereinafter Act). Defendants are Donald D. Lane, president of Local 600 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the Union); Clyde R. Goad, vice-president; Daniel R. Mahany, secretary-treasurer; and Michael Ryan, recording secretary. Defendants each received three different salary increases of $50.00 per week that were not authorized in accordance with the Union's constitution.

The District Court[2] sentenced Lane to two years imprisonment each on Counts 7, 8, and 9, the sentences to run concurrently, and three years probation each for Counts 1 through 6 and 10 through 12, such probation to run concurrently and to be served following completion of the sentence for Counts 7, 8, and 9. Goad received 18 months imprisonment (six months imprisonment and one year probation) each on Counts 1 and 2, to be served concurrently, and three years probation on Count 3 to be served after the sentence on Counts 1 and 2. Ryan received 18 months imprisonment (six months imprisonment and one year probation) each on Counts 4 and 5, to be served concurrently, and three years probation for Count 6, to be served after the sentence for Counts 4 and 5. Mahany received two years imprisonment each on Counts 10 and 11, to be served concurrently and pursuant to parole eligibility under 18 U.S.C. §4208 (a)(2). Mahany also received three years probation for Count 12, to be served after completion of the sentence for Counts 10 and 11. We affirm the convictions of all four defendants.

Members of the Union are 7,500 over-the-road truck drivers operating out of St. Louis and dockhands. The Union is governed by a seven member Executive Board, comprised of the local president, vice-president, secretary-treasurer, recording

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[2] The Honorable William H. Webster, then United States District Judge of the Eastern District of Missouri, and now of the Eighth Circuit, presided.

secretary (the four defendants occupied these offices during the times herein pertinent), and three trustees, all elected by the members every three years. The daily affairs are managed by the four officers, who were in this case first elected in 1968 and re-elected by a two-to-one margin in December, 1971. The Union receives over one million dollars in annual dues, and its treasury in December, 1968, totaled approximately $2,000,000.

The previous officers held office for all but one week during 1968 and received the following salaries: president, $21,000; vice-president, $15,000; secretary-treasurer, $19,600; and recording secretary, $17,700. The defendants received the following salaries and expenses from 1968-1971:

Elected Official	1968		1969		1970		1971	
	Salary	Expenses	Salary	Expenses	Salary	Expenses	Salary	Expenses
Lane	$ 350	---	$23,418	$6,432	$34,811	$6,289	$36,133	$6,132
[illegible]	300	---	21,600	3,928	30,610	4,450	33,311	5,086
Abbey	300	$2,173	23,771	5,303	34,814	11,677	38,742	12,526
Ryan	300	---	20,870	2,595	32,862	4,982	33,728	4,974

President Donald Lane authorized separate $50.00 per week pay increases for the periods commencing May 24, 1969, October 18, 1969, and January 5, 1970. Neither the Executive Board nor the general membership specifically authorized or approved any of the salary increases. Each salary increase was the basis of a charged violation against each defendant for his own salary increases. Lane, however, was charged with three violations for his own three salary increases and with nine violations relating to the three salary increases for each of the three other officers. The Government did not contend that substantial expense money received was illegal.

Section 7.02(b) of the Union's constitution requires the Executive Board to "[a]pprove the salaries, benefits, allowances, direct and indirect disbursements, expenses and reimbursement of expenses for officers, agents and employees." The minutes

from every Executive Board meeting from December 22, 1968, through October 15, 1972, were admitted into evidence, and no approval of the three salary increases for any of the officers was recorded.[3] Defendants make no claim that the Executive Board or the membership expressly approved of the salary increases, and the three trustees testified that they did not know of the increases. In late 1971, when all of the officers were running for reelection, Union members asked at different Union membership meetings what the officers were being paid. Apparently, Lane responded at these times that "I'll not discuss it with you or anyone else" or "I don't ask what you make and you shouldn't ask me what I make." Mahany often said to "[c]ome on up and look at the books; they are always open." Apparently, Union members first learned of the substantial increases in late 1971, when a candidate for president, opposing Lane, obtained accurate salary information from the LM-2 reports filed with the Government pursuant to the Act and mailed copies of those reports to the members.

Defendants' main contention is that the following resolution[4] approved by the Union membership granted to the President and Secretary-Treasurer the power to increase salaries without approval of the Executive Board.

> [T]he President and Secretary-Treasurer have the authority which is hereby confirmed, verified, and extended to make such expenditures and use of Teamsters Local 600 funds and facilities to whatever extent they believe is related to

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[3] Previous salary increases granted in 1966 and 1967 were properly approved and recorded in the Board's minutes.

[4] The briefs and record do not indicate exactly when this resolution was in effect. Defendants state that it was in effect from 1966 through April, 1972, and was periodically introduced and approved at Union membership meetings. Due to our above discussion in the text, resolution of the effectiveness of the resolution or resolutions is unnecessary.

the interests and benefit of Teamsters Local 600 without any prior approval.

We agree with the Government that this general resolution cannot be read as rescinding the specific constitutional provision requiring Executive Board approval of salary increases. To do so would defeat the provisions of the Union's constitution. Defendants urge other contentions that the Union's constitution authorized the salary increases; however, we think that §7.02(b) of the Union's constitution clearly takes precedence and provides that salary increases must be approved by the Executive Board.

Defendants also argue that the Government must prove "lack of union benefit" as an essential element of a crime under §501 (c). Since the District Court instructed the jury that a §501(c) crime contains the essential elements of a specific intent to deprive the union of its funds and an unauthorized expenditure of union funds, defendants argue that it was prejudicial error not to include the alleged element of lack of union benefit. Defendants contend that the essential elements of every §501(c) crime are: (1) specific intent to deprive the union of its funds, (2) unauthorized expenditure of union funds, **and** (3) lack of union benefit from the expended funds.

In order to decide whether lack of union benefit from expended union funds—in this case, unauthorized salary increases —is an element of a §501(c) crime, we review the legislative history and Congressional purpose of §501. This court has clearly held that "Congress intended that it [the Act] should not be interpreted by the Courts narrowly or strictly, but to the contrary, that its confines are broad." **Johnson v. Nelson,** 325 F.2d 646, 650 (8th Cir. 1963); **accord, Pignotti v. Local No. 3 Sheet Metal Workers' Int. Ass'n,** 477 F.2d 825, 832-35 (8th Cir. 1973). We said in **Johnson:**

> Thus it plainly appears that the statute is broad in its reach. Officers and other union representatives may not

> act adversely to their organization or to the members as a group, or acquire a personal interest which is contrary to the interests of the organization. Being trustees the officers must subvert their own personal interests to the lawful mandates and orders of the organization.

Johnson v. Nelson, *supra,* at 650.

Section 501 should be interpreted broadly in order to insure that elected union officials fulfill their responsibilities as fiduciaries to their members, guard union funds from predators, and keep intact all such funds except those expended in the legitimate operation of the union's business. The funds should be treated as trust funds belonging to the union's members. Section 501(a), titled in part "Fiduciary responsibility of officers of labor organizations," specifically states:

> (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder * * *.

Much has been written by many courts concerning the fiduciary responsibility of union officials imposed by §501,[5] how-

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[5] **E.g., Lawson v. United States,** 300 F.2d 252, 254 (10th Cir. 1962) ("highest standards of ethical conduct"); **Johnson v. Nelson,** 325 F.2d at 650; **United States v. Harmon,** 339 F.2d 354, 357 (6th Cir. 1964), **cert. denied,** 380 U.S. 944 (1965); **United States v. Silverman,** 430 F.2d 106, 113 (2d Cir.) (Moore, J., dissenting on this issue), **modified on other grounds,** 439 F. 2d 1198 (2d Cir. 1970); **Pignotti v. Local No. 3 Sheet Metal Workers' Int. Ass'n,** 477 F.2d at

ever, House Report No. 741, prepared by the Committee on Education and Labor, trenchantly describes the purposes of the Labor-Management Reporting and Disclosure Act.[6] In commenting on union financial and administrative practices, House Report No. 741 said:

> The members of a labor organization are the real owners of the money and property of such organizations and are entitled to a full accounting of all transactions involving such money and property. Because union funds belonging to the members they should be expended only in furtherance of their common interest. A union treasury should not be managed as though it were the private property of the union officers, however well intentioned such officers might be, but as a fund governed by fiduciary standards.
>
> The conduct of the financial affairs of labor unions and the conduct of union officers in their capacity as officers of labor organizations are matters of proper concern to the Federal Government. This is so because the funds that pass through union treasuries and for which unions and their officers are responsible constitute vast sums of

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834; **United States v. Haverlick,** 195 F.Supp. 331, 332 (N.D.N.Y. 1961) ("highest standards of responsibility and ethical conduct in administering the affairs of their organization"). Although the section's major thrust is to protect union funds from fiduciary embezzling or converting, this court has held that it is not "an essential element of the crime charged [under § 501(c)] that the moneys had been held by appellant in some fiduciary capacity." **Doyle v. United States,** 318 F.2d 419, 423 (8th Cir. 1963).

[6] House Report No. 741 discussed the Eliot Bill (H.R. 8342), one of four separate bills covering this same area of labor law. **Pignotti v. Local No. 3 Sheet Metal Workers' Int. Ass'n,** 477 F.2d at 833. The Eliot Bill contained a fiduciary provision identical to a provision contained in the Landrum-Griffin Bill, which eventually became the Landrum-Management Reporting and Disclosure Act. **Pignotti v. Local No. 3 Sheet Metal Workers' Int. Ass'n,** 477 F.2d at 833; **Johnson v. Nelson,** 325 F.2d at 650. House Report No. 741 is, therefore, proper legislative source material to ascertain Congress' purpose in passing § 501.

> money, and the uses to which these funds are put have a substantial impact on the Nation's economy. Furthermore, if unions are to enjoy the protection of rights and exercise the broad powers which are guaranteed to them by the National Labor Relations Act and the Railway Labor Act, they ought also to be held responsible for abuses that have accompanied the exercise of such powers and rights by some union leaders.
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> • • • • • • • •
>
> It is the purpose of this bill to insure that full information concerning the financial and internal administrative practices and procedures of labor organizations shall be, in the first instance available to the members of such organizations.

U.S. Cong. & Adm. News, Vol. 2, 86th Cong. 1st Sess. 1959, H.Rep. No. 741, at 2430.

The statute, cases, and legislative history clearly establish that union officers are fiduciaries for union members, and a willful misappropriation of union funds by officials constitutes a violation of § 501(c). In **United States v. Bryant,** 430 F. 2d 237, 239 (8th Cir. 1970), we indicated that "a conviction would be supported by proof of willful embezzlement." In **Bryant,** however, "lack of union benefit" as an essential element was not raised, and we only stated that "[t]he court properly instructed the jury as to the essential elements of each offense charged." 430 F.2d at 239. Similarly, other Eighth Circuit cases do not discuss this issue. **E.g., Hayes v. United States,** 329 F.2d 209 (8th Cir.), **cert. denied sub nom. Bennett v. United States,** 377 U.S. 980 (1964); **Doyle v. United States,** 318 F.2d 419 (8th Cir. 1963). The issue of whether "lack of union benefit" is an essential element of the crime under § 501(c) has not been raised before in this circuit. Probably because the common law crime of embezzlement consists of an unauthorized taking for personal use, otherwise stated, a

conversion of entrusted funds to the personal use of the fiduciary, any incidental benefits that may fortuitously inure to the benefit of the victim is immaterial. In the broader category of willful misuse or abstraction of union funds and the conversion of them for the personal use of the converter or for non-union purposes, the issue of union benefit might be material where there was proper authorization for the payment of the funds, for example, the payment of authorized political contributions.

The Second Circuit has had occasion to probe this issue more deeply than any of the other circuits. Its decisions in **United States v. Silverman,** 430 F.2d 106 (2d Cir.), **modified on other grounds,** 439 F.2d 1198 (2d Cir. 1970), and **United States v. Ferrara,** 451 F.2d 91 (2d Cir. 1971), present other factual situations as applied to the proscriptions of § 501(c). In **Silverman,** the defendant labor official was charged with violations of § 501(c) in Counts 1 through 8 for political contributions and in Counts 10 through 13 with receiving four Christmas gratuity checks. Judge Moore wrote the majority opinion for all counts except the political contributions charges, and his majority opinion on the § 501(c) counts relating to the Christmas checks affirmed defendant's conviction. Judge Friendly joined by Judge Hays wrote the majority opinion for the charges relating to the political contributions disguised in union records as payments for printing and reversed defendant's conviction on these counts.

In discussion of the Christmas checks counts, Judge Moore stated that defendant argued that the evidence failed "to support a finding that the money was expended for a non-union purpose." **United States v. Silverman,** 430 F.2d at 117. However, the discussion on this issue for these charges does not hold that the Government had to prove lack of union benefit. Judge Moore held that only Silverman knew for what purpose the checks were used and that he failed to offer evi-

dence that the checks were used for union benefit. Since the burden of proof for union benefit was placed on defendant, this would seem to imply that "lack of union benefit" would not be an essential element of a § 501(c) violation to be proved by the Government. Judge Friendly did not discuss the counts relating to the Christmas checks.

The political contributions charges are more fully discussed in **Silverman.** Judge Moore, dissenting on these charges, said:

> [A] conviction under section 501(c) may be made out by a demonstration of a fraudulent intent to deprive the union of its funds and either a lack of bona fide authorization **or** an absence of benefit to the labor organization from the expenditure.

United States v. Silverman, 430 F.2d at 117 (emphasis added). Therefore, according to Judge Moore, the essential elements of a § 501(c) violation vary. First, the essential elements may be: (1) a fraudulent intent to deprive the union of its funds and (2) a lack of authorization according to the union's bylaws and constitution. Second, the essential elements could be: (1) a fraudulent intent to deprive the union of its funds and (2) an absence of benefit to the union. This would most likely apply to the situation where there was authorization on the record but a lack of benefit to the union coupled with a fraudulent intent. **United States v. Dibrizzi,** 393 F.2d 642 (2d Cir. 1968).

Judge Friendly, whose opinion states the majority view in **Silverman** on the political contributions counts, only assumes *arguendo* that Judge Moore's statement of the essential elements is correct and eventually holds no reasonable jury could be convinced beyond a reasonable doubt of defendant's guilt on these charges—a failure of proof. The only conclusion, therefore, that can be drawn from **Silverman's** discussion on the political contributions counts is that the essential elements were not delineated.

The Government contends that **United States v. Ferrara,** *supra*, makes "certain that Judge Friendly * * * had not rejected Judge Moore's analysis in **Silverman.**" While that analysis might be correct, we do not read **Ferrara** that broadly. The Government in **Ferrara** introduced evidence that there was a lack of authorization for long-term auto leases made for the personal benefit of the union officials. The court said that "[b]y its verdict of guilty the jury found that appellants, without authority **and for personal** purposes, entered into long-term auto leases for themselves and their Union friends." **United States v. Ferrara,** 451 F.2d at 96 (emphasis added). It also said in relation to another § 501(c) count that "[t]he first defense to this charge was that the dinners were for Union business, but there was evidence that they were merely social occasions." 451 F.2d at 96. Finally, the court concluded on this charge that "plainly the jury was justified that these were unauthorized expenditures for personal benefit." 451 F.2d at 96. Obviously, the jury could have concluded from the evidence presented that there was fraudulent intent, lack of authorization, **and** lack of union benefit. Since **Ferrara** neither discusses the district court's charge nor states the elements of the offense, we certainly cannot say that the Second Circuit has established lack of union benefit as an essential element of a § 501(c) offense. Rather, Judge Moore's well-reasoned opinion in **Silverman** appears to state the Circuit's view where there is a lack of authorization for the expenditures, and Judge Friendly's opinion in **Silverman** states that Circuit's view where there has been a sufficient authorization.

Thus, we cannot accept defendants' view that "lack of benefit to the union" is an essential element in this case involving the unauthorized increased salaries of the Union's officers. We think that the Government sufficiently proved a submissible case by demonstrating that the officers fraudulently intended to deprive the Union of its funds by taking unauthorized salary increases, that is, by knowingly taking increases not authorized

according to the Union's constitution and bylaws. According to Judge Moore's statement of the essential elements in **Silverman**, the Government proved a *prima facie* case by establishing fraudulent intent and lack of authorization.

If the Government establishes fraudulent intent and lack of proper authorization, it should not also be saddled with an additional burden of proving lack of benefit to the union. To do so would emasculate the Act. Aside from the difficulties of proving a negative fact, such as lack of union benefit, we do not think that Congress intended that union funds be the fair subject of embezzlement that is only vaguely premised on claimed union benefit. The conduct of these defendants cannot by any stretch of the imagination or by the use of sophisticated semantics be raised to the level of conduct required of fiduciaries, who at common law and in the ordinary context of that term are charged with a high degree of integrity and candor in their dealings with fiduciary funds, together with strict proscriptions against self-dealing.

Section 501(a) specifically says that a fiduciary responsibility includes expending union funds "in accordance with its constitution and bylaws." The overall purpose of the Act is to protect union property and funds, to provide full disclosure of financial affairs of the union, to establish self-help remedies for union members, and to impose criminal sanctions under § 501 (c). The unauthorized expenditures of union funds with a fraudulent intent alone is exactly what the Act was attempting to reach. The purpose of the Act was "to insure that full information concerning the financial and internal administrative practices and procedures of labor organizations"[7] is available to union members. The exercise of power by union officials is not unfettered, but checked in the first instance by proper

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[7] U.S. Cong. & Adm. News, Vol. 2, 86th Cong. 1st Sess. 1959, H.Rep.No. 741, at 2430.

approval within its own ranks. The salary increases, which were not approved by the Executive Board, effectively were kept secret until the second reelection of defendants. Section 501(c) was designed to reach this exact type of occurrence. In upholding the constitutionality of § 501(c), the District Court in the Northern District of New York perceptively said:

> [T]he power of a labor organization to bargain collectively in matters affecting commerce, all of which is now regulated by statute, would be lessened by the misuse or abuse of its funds to the diminution of its power to bargain in matters affecting commerce.

United States v. Haverlick, 195 F.Supp. 331, 332 (N.D.N.Y. 1961).

The Government appropriately points out that several "felonious taking" statutes do not require a showing of lack of benefit.[8] Section 501(c) should be interpreted similarly. We do not think that lack of union benefit need be established when the funds are **unauthorizedly** expended, because § 501(c)'s language of "embezzles, steals, or unlawfully and willfully abstracts or converts to his own use" only "means * * * 'not to the use of the entruster'." **United States v. Harrelson,** 223 F.Supp. 869, 870 (E.D.Mich. 1963).

We, therefore, hold that the essential elements of a § 501(c) crime in this case are: (1) fraudulent intent to deprive the union of its funds and (2) lack of authorization according to the union's constitution and bylaws.[9] Since we have held that the salary increases lacked the proper authorization, we do not

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[8] **E.g.,** 18 U.S.C. § 641, 18 U.S.C. § 645, 18 U.S.C. § 654, 18 U.S.C. § 655, 18 U.S.C. § 656, 18 U.S.C. § 657, 18 U.S.C. § 658, 18 U.S.C. § 659, 18 U.S.C. § 660, 18 U.S.C. § 661, and 15 U.S.C. § 80a-36.

[9] **Accord, United States v. Harrelson,** 223 F.Supp. 869 (E.D. Mich. 1963).

reach the issue whether there is a § 501(c) violation when there has been a fraudulent intent and proper authorization, but a lack of benefit to the union. That situation presents a more troublesome issue: namely, does § 501(c) protect union funds by penalizing union officials when the members themselves have authorized union officials to expend union funds for non-union purposes? That issue must wait for another day.

In summary, fraudulent intent to deprive the union of its funds and a demonstrated lack of authorization, is sufficient for a prosecution under § 501(c). Lack of union benefit is not essential, but fraudulent intent must be proved; that is, the intent to deprive the union of its funds, not an intent to deprive the union of its funds that are not expended for union benefit. For example, if by mistake or accident a union official spends funds that are unauthorized, he is not liable under § 501(c).[10] To hold that "lack of union benefit" must be affirmatively proved by the prosecution and to allow a showing of union benefit to vitiate fraudulent intent in a case involving unauthorized expenditures would allow union officials to handily evade the broad fiduciary provisions of § 501(c) and the essential elements of a § 501(c) violation.

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[10] **United States v. Bryant,** 430 F.2d at 239, held that "willfulness is an essential element of the offense charged." Willfulness or criminal intent is commonly defined as an "act (or omission) * * * committed (or omitted) by defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident or good faith." **United States v. Rabb,** 394 F.2d 230, 232 (3rd Cir. 1968), **quoting** Manual on Uniform Jury Instructions in Federal Criminal Cases of the United States District Court for the Northern District of Illinois, 33 F.R.D. 529, 553 (1963). We think, under the circumstances of this case, "good faith" cannot include, as a matter of law, spending union funds thinking it proper since the union would benefit from the expenditure. The fiduciary responsibility requires union officials to follow the proper procedures to authorize the expenditure of funds. A union official cannot be acting in "good faith" when not following his union's own procedures for authorizing expenditures. An elected union official must know the proper procedures for conducting his union's business.

Defendants finally contend that proffered evidence, for example, on defendants' longer working hours, was "highly probative" on the matter of intent. According to our above discussion, a case involving lack of authorization under § 501(c) does not require a proof of lack of benefit to the union as an essential element, nor is a showing of benefit relevant to disproving fraudulent intent to deprive the union of its funds where the disbursement was unauthorized. The District Court properly refused to admit all such evidence on the grounds of irrelevancy.

Judgment of convictions affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals for the Eighth Circuit

APPENDIX B 1

United States Court of Appeals
for the Eighth Circuit

No. 73-1309 September Term, 1973

The United States,
Appellee,

vs.

Michael Ryan,
Appellant.

Judgment

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

January 14, 1974

APPENDIX B 2

United States Court of Appeals
for the Eighth Circuit

No. 73-1309 September Term, 1973

The United States,
Appellee,
vs.
Clyde R. Goad, et al.,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 5, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1293

CLYDE R. GOAD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, union officers, contend that the court of appeals erred in allegedly holding that intent was not an element of the crime of embezzlement of union funds; that the district court erred in precluding them from introducing evidence which they claim would have negated their intent to embezzle; that the government was required to prove that the embezzled funds were not used to benefit the union, even though the funds were appropriated in the form

of unauthorized salary increases for petitioners; and that the appropriations of the union funds were ratified and approved by the membership in general expenditure resolutions which did not mention salary expenditures, although the union constitution requires that all salary increases be approved by the union executive board.

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted of embezzlement of union funds, in violation of 29 U.S.C. 501(c). Each petitioner was convicted of three counts of embezzlement through the unauthorized receipt of each of three different salary increases. In addition, petitioner Lane, the president of the union, was convicted of abetting the other three in each of their embezzlement counts. Lane was sentenced on the three embezzlecent counts to concurrent terms of imprisonment for two years, subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2), to be followed by concurrent three-year terms of probation on the nine abetting counts. Petitioners Goad and Ryan were each sentenced to concurrent terms of 18 months imprisonment on two of their embezzlement counts, with the first six months to be served in jail and the remainder on probation; sentence was suspended on the third embezzlement count, and they were placed on three years' probation to commence after service of the former sentences. Petitioner Mahany was sentenced to two concurrent terms of imprisonment for two years, subject to the early parole eligibility

provisions of 18 U.S.C. 4208(a)(2); sentence was suspended on the third embezzlement count, and he was placed on two years' probation to commence after service of the former sentences. The court of appeals affirmed in a comprehensive opinion (Pet. App. A1-A15).

The facts are set forth fully in the opinion of the court of appeals (Pet. App. A2-A5). The evidence showed that on three different occasions petitioners, officers of a local Teamsters union, granted themselves salary increases of $50 a week each. The constitution of the union (Section 7.02(b)) required that the executive board of the union "[a]pprove the salaries * * * for officers * * *." Petitioners' salary increases were not approved by the executive board of the union, and the general membership of the union did not specifically authorize or approve them. Indeed, petitioners admit (Pet. 4) that the general membership was never specifically informed of the salary increases.

Petitioners' main defense was that the salary increases were authorized by general expenditure resolutions passed each month by the membership.[1] At trial petitioners offered to prove that the salary increases were justified by increased hours of work; that the increases were comparable to those received by union members in various jobs in industry; that the increases brought petitioners' salaries up to the levels of other local union officers; and that the in-

[1] The text of the relevant resolution appears at p. 9, *infra*.

creases were fairly earned, on an equitable or *quantum meruit* basis, or that petitioners believed them to be so earned. The offers of proof were rejected by the district court upon the government's objection (Pet. 4-5).

1. Petitioners' contention (Pet. 6-7) that the court of appeals held that intent was not an element of the crime of embezzlement of union funds is erroneous. The court specifically held that "fraudulent intent to deprive the union of its funds" is one essential element of a violation of Section 501(c) (Pet. App. A13). This holding is consistent with the instructions on specific intent that the trial judge gave the jury (T. 739-740).[2]

In noting that "[a] union official cannot be acting in 'good faith' when not following his union's own procedures for authorizing expenditures" (Pet. App. A14, n.10), the court of appeals was not reading the intent requirement out of the statute, but was only holding that, "under the circumstances of this case" (*ibid.*), good faith would not have been shown by petitioners' belief that their unauthorized expenditures would benefit the union. Indeed, petitioners do not contend that there was insufficient evidence of fraudulent intent. Moreover, the court of appeals stated (Pet. App. A11-A12): "We think that the Government sufficiently proved a submissible case by demonstrating that the officers fraudulently intended to deprive the Union of its funds by taking

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[2] "T." refers to the trial transcript.

unauthorized salary increases, that is, by knowingly taking increases not authorized according to the Union's constitution and bylaws."

2. Petitioners argue (Pet. 7-8) that the district court erred in precluding them from introducing evidence that they claim would have negated fraudulent intent. The evidence they offered, however, would only have supported petitioners' contention that they believed the pay raises were deserved and were fair in amount. It would not have established that petitioners believed they had the right to appropriate the union funds without authorization by the executive board, and it would not have negated their fraudulent intent in circumventing the precise, constitutionally mandated procedures to obtain such increases. Accordingly, the evidence was properly excluded. On petitioners' theory, any embezzler who honestly believed he deserved the money he took would have to be acquitted. This position is unsupportable.[3]

3. Petitioners' contention (Pet. 8-10) that the government was required to prove lack of benefit to the union was fully considered and properly rejected by the court of appeals (Pet. App. A5-A14), on whose opinion we rely. The court correctly stated:

> The statute, cases, and legislative history clearly establish that union officers are fiduci-

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[3] The cases cited by petitioners (Pet. 7) are inapposite. They consider the types of relevant evidence that may be introduced to negate criminal intent; none holds that irrelevant evidence may be so introduced.

aries for union members, and a willful misappropriation of union funds by officials constitutes a violation of § 501(c). * * * [Pet. App. A8.]

* * * * *

If the Government establishes fraudulent intent and lack of proper authorization, it should not also be saddled with an additional burden of proving lack of benefit to the union. To do so would emasculate the Act. Aside from the difficulties of proving a negative fact, such as lack of union benefit, we do not think that Congress intended that union funds be the fair subject of embezzlement that is only vaguely premised on claimed union benefit. The conduct of these defendants cannot by any stretch of the imagination or by the use of sophisticated semantics be raised to the level of conduct required of fiduciaries, who at common law and in the ordinary context of that term are charged with a high degree of integrity and candor in their dealings with fiduciary funds, together with strict proscriptions against self-dealing.

Section 501(a) specifically says that a fiduciary responsibility includes expending union funds "in accordance with its constitution and bylaws." The overall purpose of the Act is to protect union property and funds, to provide full disclosure of financial affairs of the union, to establish self-help remedies for union members, and to impose criminal sanctions under § 501(c). The unauthorized expenditures of union funds with a fraudulent intent alone is exactly what the Act was attempting to reach. The purpose of the Act was "to insure that full information concerning the financial and internal adminis-

trative practices and procedures of labor organizations" is available to union members. The exercise of power by union officials is not unfettered, but checked in the first instance by proper approval within its own ranks. The salary increases, which were not approved by the Executive Board, effectively were kept secret until the second reelection of defendants. Section 501(c) was designed to reach this exact type of occurrence. * * * [Pet. App. A12-A13.]

* * * * *

We, therefore, hold that the essential elements of a § 501(c) crime in this case are: (1) fraudulent intent to deprive the union of its funds and (2) lack of authorization according to the union's constitution and bylaws. * * * [Pet. App. A13.]

* * * * *

To hold that "lack of union benefit" must be affirmatively proved by the prosecution and to allow a showing of union benefit to vitiate fraudulent intent in a case involving unauthorized expenditures would allow union officials to handily evade the broad fiduciary provisions of § 501(c) and the essential elements of § 501(c) violation. * * * [Pet. App. A14.]

Contrary to petitioners' claim, the court of appeals' decision does not conflict with the Second Circuit's decision in *United States* v. *Silverman*, 430 F. 2d 106. In that case all members of the panel assumed, consistently with the decision in the present case, that a conviction under Section 501(c) may be based on proof of fraudulent intent "and *either* a lack of bona

fide authorization *or* an absence of [union] benefit." 430 F. 2d at 117, 127 (emphasis supplied). The panel was divided over whether the evidence was sufficient to show lack of authorization. The court in the present case thus correctly concluded (Pet. App. A11) "[w]e certainly cannot say that the Second Circuit has established lack of union benefit as an essential element of a § 501(c) offense."[4]

We note also that, while absence of union benefit is not an element of the offense, the circumstances of this case would not support a claim of union benefit. The money that petitioners appropriated went into their own pockets; it was not used by or for the union or the membership. It was certainly not used to purchase petitioners' services as officers, because petitioners agreed to provide those services at the original salaries by accepting the offices to which they were elected.

Petitioners' example of the hypothetical union president who purchases emergency picket signs without express authorization (Pet. 9) is inapposite. He would be guilty of a crime only if his acts were done with a "fraudulent intent to deprive the union of its funds" (Pet. App. A13).

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[4] In *United States* v. *Vitale*, 489 F. 2d 1367 (C.A. 6), upon which petitioners also rely, the court upheld the conviction of a union officer who purchased an automobile from the union at $1,200 to $1,400 less than its market value. The court did not hold that a lack of union benefit is an essential element of the crime where the expenditure is unauthorized.

4. Petitioners contend (Pet. 10-11) that the general expenditure resolution passed by the membership each month authorized or ratified the pay raises. The resolution stated (Pet. App. A4-A5):

> [T]he President and Secretary-Treasurer have the authority which is hereby confirmed, verified, and extended to make such expenditures and use of Teamsters Local 600 funds and facilities to whatever extent they believe is related to the interests and benefit of Teamsters Local 600 without any prior approval.

The court of appeals correctly held (Pet. App. A5):

> [T]his general resolution cannot be read as rescinding the specific constitutional provision requiring Executive Board approval of salary increases. To do so would defeat the provisions of the Union's constitution. * * *

The cases cited by petitioners (Pet. 10) do not hold that courts are bound by the union officers' interpretation of the union's constitution. Quite the opposite is true; those cases hold that courts will not be bound by the union officials' interpretation where it is not fair and reasonable. It would not be a fair and reasonable interpretation of the general resolution to hold that it rescinded the specific constitutional pro-

vision designed to protect union treasuries from the very misappropriations which took place in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 547911 280

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1293

CLYDE R. GOAD, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

1. In Point 1 of the "Memorandum for the United States in Opposition" (p. 4), the Solicitor General argues that the Eighth Circuit opinion below did not eliminate intent as an element of a 501(c) violation, and that the holding (to which he points with approval) was simply that "good faith would not have been shown by petitioners' belief that their unauthorized expenditures would benefit the union." This passage alone demon-

strates the wide disparity between the Eighth Circuit-Solicitor General viewpoint and the long existing common law, hence the need for Supreme Court review. In the first place, it is not for the Court or the government to speculate as to the ultimate effect of "petitioners' belief"; rather, it is the sole function of the jury to make this determination. Moreover, the above-quoted passage directly contradicts the plain holding of Judge Moore in *United States v. Silverman*, 430 F. 2d 106, 115:

> "The existence of a bona fide union benefit would be strong evidence that there was no intent to deprive the union of the use of its funds."

It is indeed paradoxical for the Eighth Circuit (and the Solicitor) to deny that they have eliminated intent as an element of the offense on the one hand, yet categorically refuse to permit evidence to refute intent on the other.

2. In Point 2 of his argument (p. 5), the Solicitor urges that the excluded evidence (as to reasonableness and justification for petitioners' pay raises) would not have negated the "fraudulent intent in circumventing the precise, constitutionally mandated procedures to obtain such increases." By this neat bootstrap argument, the Solicitor assumes that the act of circumventing the constitutionally mandated procedures is *ipso facto* proof of fraudulent intent. Such is not the case; fraudulent intent in this type of crime is a separate element which must be separately proved to the satisfaction of the jury, *Morisette v. United States*, 342 U. S. 246, 276, and is not synonymous with violating the union's constitution. The Solicitor's argument, of course, is that some sort of presumption of fraudulent intent arises from the mere fact that petitioners intentionally "circumvented" the union's constitutional procedures,[1] and that this

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[1] Petitioners, by this argument, certainly do not concede that there were "precise, conditionally mandated procedures" for this union. Rather, petitioners contend, the procedures authorized by the union's constitution, by-laws, and resolutions were duplicitous, overlapping, and ambiguous, at best.

presumption cannot be offset or rebutted by evidence that petitioners otherwise acted in good faith. But this argument, too, was rejected in *Morisette*, where this Court held that "presumptive intent" has no place in this type of case, 246 U.S. at p. 275. The intent must be determined, says *Morisette*, "not only from the act of taking, but from that together with defendant's testimony *and all of the surrounding circumstances*." (Emphasis added, 246 U.S. at p. 276.) The Eighth Circuit and Solicitor General, however, would bar the proof of these surrounding circumstances.

3. The Solicitor's assertion, in Point 3 of his brief, that all members of the panel in *United States v. Silverman*, supra, "assumed" that a 501(c) conviction may be based *either* on a lack of authorization *or* an absence of union benefit, is misleading. The majority of that panel (Judges Friendly and Hayes) simply stated that "even if one should accept *arguendo*" that a 501(c) conviction can be supported by either a lack of authorization or an absence of union benefit, the record was fatally deficient, 430 F. 2d at p. 127. It is patently clear from this opinion, and the language of Judge Friendly (concurred in by Judge Hayes), that they did not agree with Judge Moore's minority opinion that either element (lack of authorization *or* absence of union benefit) would sustain a conviction.

The Solicitor also argues that, since petitioners accepted the offices to which they were elected at specified salaries, no union benefit could have been derived from paying additional monies to them. This argument overlooks the uncontradicted evidence that after petitioners took office, their hours of work and extent of duties vastly increased; certainly they were not under any binding contract to continue to work for their original salaries, and were free to resign (or reduce the scope of their activities, to the detriment of the union) if they did not receive increases. Thus, the record clearly contains evidence which would permit the jury to find (if it so chose) that the union did benefit, or

receive a *quid pro quo*, from these salary increases. The prejudice to petitioners is that the Solicitor has again substituted his view of the evidence for a jury's.

Respectfully submitted

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